Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

YARDARM RESTAURANT, INC.

Petitioner,

V.

CITY OF POMPANO BEACH, FLORIDA

Respondent.

On Petition For a Writ of Certiorari
To the District Court of Appeal
Fourth District of Florida

APPENDIX TO PETITIONER'S BRIEF

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YARDARM RESTAURANT, INC.,
Petitioner,

v.

CITY OF POMPANO BEACH,
Respondent

Case No. 84,543

Supreme Court of Florida
District Court of Appeal,
4th District — No. 91-1829
Monday, January 30, 1995

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, SHAW, KOGAN, HARDING AND WELLS, J.J., concur

A True Copy
TEST:
Sid J. White
Clerk, Supreme Court

BH
cc: Hon. Frank J. Habershaw, Clerk
Marilyn N. Beuttenmuller, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. C. Lavon Ward, Judge

Mr. James C. Pilkey
Mr. Randolph Adams
Mr. Earl Faircloth
Mr. Anthony J. Carriuolo
Mr. Henry Latimer
Mr. Gale Ciceric Payne

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CITY OF POMPANO BEACH,
Appellant,

v.

YARDARM RESTAURANT, INC.,
Appellee.

Case No. 91-1829

July Term 1994

Opinion filed September 9, 1994

Appeal from the Circuit Court for Broward County,
C. Lavon Ward, Judge.

Henry Latimer of Eckert, Seamans, Cherin & Mellott,
Fort Lauderdale, for Appellant.

Gale Ciceric Payne and James C. Pilkey of Payne, Pilkey
& Associates; Earl Faircloth and Randolph W. Adams,
Fort Lauderdale, for Appellee.

Griffin, J., Associate Judge.

This is the appeal of a non-final order[1] in a non-jury action finding the City of Pompano Beach ["Pompano Beach" or "City"] liable for the inverse condemnation of property owned by the Yardarm Restaurant, Inc. ["Yardarm"]. We reverse because the record fails to establish the requisite taking and because any "taking" claim would be time barred.

Yardarm, which was held in equal shares by brothers Jim and Tom Stephanis, had operated a successful restaurant[2] in Pompano Beach from 1959 until 1972 on a parcel of land that overlooked the Hillsborough Inlet with a view of the Hillsborough Inlet lighthouse [the "east parcel"]. In 1972, Yardarm decided to make a more profitable use of its property by building a European-style grand hotel and marina on the property. Yardarm's initial plans, which called for an eighteen story, 165 room hotel and marina, were submitted for approval to Pompano Beach in February 1973.

Yardarm's plans were met with vigorous public opposition, especially from a condominium association across from the Yardarm which feared that the hotel and marina would block its members' view of the inlet and lighthouse. In apparent response to the opposition, on May 1, 1973, the Pompano Beach commission passed an ordinance imposing a ten-story height restriction on new buildings in Pompano Beach.

Yardarm applied for an exception to the ordinance, and despite continued opposition to the plan, on October 2, 1973, Pompano Beach passed ordinance number 73-96, which had the effect of granting a special use exception to Yardarm allowing the construction of an eighteen story hotel. Yardarm received a building permit for the project on February 14, 1974, as well as a permit for its docks and quays. Four days later, however, Pompano Beach revoked the permits due to claimed "admini-

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[1]The damage issue has yet to be tried.

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[2]The restaurant was consistently named one of Florida's best. In 1976-1977, its final year of operation, it grossed more than $1,000,000.

strative oversights," including a dispute over the number of parking spaces required for the project. In June 1974, Yardarm filed suit in Broward Circuit Court against Pompano Beach to force the issuance of its permit.

Two years later, in September 1976, the court ruled that, although Pompano Beach had "the right, and probably the duty," to rescind the permit it had issued on February 14, 1974, Yardarm was "entitled to apply for a new permit upon the presentation of plans that [were] in compliance with the building and zoning laws that were applicable on February 14, 1974." The court observed that the omissions and errors contained in Yardarm's plans were "such that the Building Official ordinarily would not have refused the permit," absent the "obvious desire by the City to oppose the granting of the building permit to the Plaintiff."

Pompano Beach did not appeal the court's decision, and Yardarm resubmitted its plans in September 1976. However, Pompano Beach again refused to issue a building permit, claiming that Yardarm had still failed to provide sufficient parking to comply with the building code, an issue which had not been directly addressed in the court's earlier order. Accordingly, in February 1977, Yardarm sought supplemental relief from the Circuit Court to require issuance of its permit. The court found in favor of Yardarm on the question of parking and Yardarm was issued a building permit on March 15, 1977, the day following the court's ruling.

Due to expenses associated with its fight to obtain the permit and rising construction costs, Yardarm claims it was no longer able to finance construction on its own. Nonetheless, Yardarm decided to proceed with preliminary site work on the project while it sought permanent financing. With its permit finally in hand, in April 1977, Yardarm closed and demolished the restaurant and began preliminary site work on the hotel.

After demolishing the restaurant, however, Yardarm realized that its new permit (unlike the earlier permit) did not contain approval for its seawall, dock and quays. With site preparation

continuing, in May 1977, Yardarm sought City approval of its seawalls and docks. Pompano Beach eventually approved the seawall, but refused to issue a dock permit, as did the Board of Appeals.

In January 1978, now with more than $591,000 invested in the project, Yardarm brought suit against Pompano Beach to require it to issue a permit for construction of the dock. While the lawsuit was pending, Yardarm slowed, and eventually stopped, construction of the hotel, apparently because of estimates that would cost $500,000 more to build the docks after construction of the hotel. In the meantime, Yardarm unsuccessfully continued to pursue permanent financing for the hotel.

Nearly one year later, in December 1978, following trial, the parties stipulated to an order which permitted Yardarm to build a dock seventy-five feet into Hillsborough Bay. However, following entry of the order, Yardarm did not resume construction of the hotel. It now faced hearings before the Corps of Engineers [the "Corps"] on the question of the issuance of a permit concerning the dock. Although Pompano Beach had been required by the December 1978 order to furnish any written assurances to the Corps, Pompano Beach's City Manager not only requested that Yardarm's application for a permit be denied, but requested a public hearing on the issuance of the permit in the event the Corps was undecided on the issue.

The Corps eventually issued the permit, but in July 1979, while the hearings requested by Pompano Beach were still in progress, Pompano Beach determined that Yardarm's building permit had lapsed due to a work suspension in excess of ninety days. In making this determination, Pompano Beach relied on their recently enacted rule that work requirements would not be tolled by litigation between the parties. Yardarm maintained that the applicable rules were those in place in 1974, when it applied for its permit, which rules preserved the permit where a work stoppage was caused by litigation.

Relying on the 1974 rules, Yardarm went back to court in July 1979, asking for an order requiring Pompano Beach to

reissue the building permit. Yardarm apparently lost before the hearing officer, but three months later, in September 1979, the Board of Appeals (which was chaired by Yardarm's architect) reinstated Yardarm's permit.

Pompano Beach appealed the board's ruling and issued a stop work order until an appeal to the Circuit Court was decided. Once the Circuit Court ruled in favor of Yardarm in December 1979, finding that the applicable rules were those in place in 1974, Pompano Beach filed a petition for writ of certiorari to the Fourth District Court of Appeal, and this time Pompano Beach issued a stop work order until the appeal or a subsequent appeal (if one was taken) to the supreme court was decided.

While the appeal was pending, Yardarm unsuccessfully continued to cast about for financing for the project. Construction costs had assertedly risen from $4.3 million in 1974 to more than $14 million in 1980. Nevertheless, Yardarm's advisors recommended the owners purchase a second parcel, west of the property Yardarm already owned, when it became available. They believed it would make the project more attractive to institutional lenders and would enable Yardarm to sign a management contract with a major hotel chain. In order to finance the purchase, however, Yardarm would have to mortgage the east parcel. Yardarm purchased the west parcel on February 14, 1981.[3]

Five months after Yardarm purchased the west parcel, in July 1981, the Fourth District Court of Appeal ruled on Pompano Beach's petition for writ of certiorari, which was directed solely to Pompano Beach's contention that the board's original order was not supported by substantial competent evidence. The court agreed with Pompano Beach that no true "evidence" had been presented to the board since the parties had relied on the argu-

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[3]Yardarm was actually able to purchase only two of the three parcels which made up the west side. It obtained a long-term lease of the third parcel, and this lease ultimately became a problem in Yardarm's attempts to obtain financing.

ment of counsel. Nonetheless, the court held that since Pompano Beach had actively participated in the proceedings before the board without objection, it could not "be heard to complain about the meeting's irregularities," and denied the petition.[4]

Approximately two weeks after the Fourth District's ruling on July 16, 1981, Yardarm's building permit for the east parcel was reissued by Pompano Beach. Because of its intervening purchase of the west side property, however, Yardarm had to redraw its plans and attempt to obtain plat approval for a building on the west side. Yardarm continued to pursue financing, this time for the consolidated project.

Recognizing that at this point it had little chance of obtaining permanent financing without a partner to guarantee its loan, Yardarm turned to Ralph Mann and Ron Schroeder of the Glen Ivy Financial Group. Mann and Schroeder agreed, in exchange for a percentage of hotel profits, to let Yardarm use their financial statements in order to obtain financing. Bank of America in San Francisco suggested Ridge Mortgage in New Jersey, a company allegedly having access to union funds. Ridge Mortgage required Yardarm to deposit in excess of $200,000 as an application fee. This turned out to be a scam and Yardarm lost the $200,000 commitment.

Following the problems with Ridge Mortgage, Yardarm continued to submit loan packages; however, because Yardarm had been required to take on a partner, it refused to consider any loan which would not fully compensate it up front for the property and repay its costs—a total of approximately $6,000,000.

Despite its continuing problems, Yardarm received two substantial offers to buy its stock in 1983. On April 28, 1983, Yardarm received an offer for $6 million for Yardarm's stock with an assumption of Yardarm's outstanding $2.2 million mortgage. This offer was withdrawn on May 5th, 1983, when the buyer learned that there was an outstanding option to purchase

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[4]*City of Pompano Beach v. Broward County Bd. of Rules and Appeals.* No. 80-145 (Fla. 4th DCA July 1, 1981) (unpublished order).

the property which had been given by Yardarm. Yardarm received an offer from a second purchaser in August 1983, for $8,000,000. Yardarm rejected the offer because it felt it was too low.

While Yardarm allegedly waited for approval of its west side permits, it took out a number of short term loans to fund the minimal construction necessary to prevent its permit on the east side from being revoked for lack of work and to pay its consultants while it sought approval of the west side. In January 1984, Yardarm took out the last of its loans, a $2.8 million loan with Sunrise Savings and Loan ["Sunrise"], part of which was used to retire Yardarm's prior loans; the remainder was used to fund sufficient construction to keep the east side permit in place.

Yardarm obtained plat approval for the west side in 1982 and site plan approval in 1984, but apparently never submitted an application for a building permit on the west side before Sunrise filed for foreclosure on May 8, 1985. With the property in foreclosure, Yardarm's permit on the east side was again revoked for insufficient work. Yardarm was informed, however, that it could reinstate the permit by refiling plans within 180 days. This deadline set by Pompano Beach would expire October 30, 1985. With the building permits lapsed, Pompano Beach also began to consider repealing the ordinance under which Yardarm had obtained its eighteen story special use exception.

The first reading of the ordinance repealer took place on September 3, 1985, and a second reading was scheduled for October 29th. In the meantime, on October 10, 1985, Yardarm submitted a consolidated plan for construction covering both parcels. Once Yardarm learned, however, that repeal of the special exception ordinance as under consider and with its permit deadline two days away, Yardarm filed suit to enjoin the Pompano Beach City Commission from meeting to repeal the eighteen story ordinance. The trial court granted the injunction on November 20, 1985.

Pompano Beach appealed the entry of the injuction, but gave Yardarm tentative approval for its consolidated plan on

February 26, 1986. By this time, however, a final judgment of foreclosure had already been entered against both properties and a foreclosure sale was set for March 21, 1986. On March 4, 1986, Pompano Beach gave Yardarm site approval for the project and notified that it had 180 days to obtain a building permit for the consolidated project, but on March 20, 1986, Yardarm filed for protection in bankruptcy court. The bankruptcy stay was later lifted and the property was sold in foreclosure to the FSLIC as receiver for Sunrise. As the lower court observed, the ironic end to this sorry saga was that Pompano Beach then purchased the land from the FSLIC. Yardarm estimates that as of the foreclosure, the land was worth $6.2 million.

In July 1987, the Fourth District Court ruled in favor of Pompano Beach in its appeal from the order enjoining it from repealing the eighteen story ordinance.[5] The issue on appeal was whether Pompano Beach's action in attempting to revoke the ordinance involved a gross abuse of discretion. Yardarm apparently argued that Pompano Beach was estopped from revoking the ordinance as to Yardarm. In holding that Pompano Beach was not estopped, the court found: (1) Pompano Beach's earlier obstructionist tactics would not form the basis for an estoppel since those tactics ceased in 1979 and Yardarm had still failed to make any real progress on the hotel in the intervening years; (2) Pompano Beach's refusal to process the application in 1985 could not form the basis for an estoppel since Pompano Beach was entitled to delay issuance of the permit given that a zoning change was in progress; and (3) Pompano Beach was not equitably estopped from revoking the ordinance (exception) as to Yardarm because there had been no showing that Yardarm had incurred "extensive obligations" or undergone such "a change in position" so as to make the doctrine applicable.

On September 15, 1987, Yardarm filed the instant action against the City of Pompano Beach for inverse condemnation of

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[5]*City of Pompano Beach v. Yardarm Restaurant, Inc.*, 509 So. 2d 1295 (Fla. 4th DCA 1987).

its property. The complaint alleged that Pompano Beach's extended obstruction of Yardarm's attempts to build its hotel and marina had worked an inverse condemnation of Yardarm's property of both a temporary and a permanent character.[6] Pompano Beach denied any taking had occurred, and asserted a number of affirmative defenses, including res judicata, collateral estoppel, law of the case and the statute of limitations. When Yardarm ultimately identified the precise date of taking as October 30, 1985, the date on which its right to reinstate the building permit on the east side expired, Pompano Beach also asserted the defense of failure to exhaust administrative remedies.

At trial, Yardarm's case was based on evidence that City officials had willfully obstructed construction on the east side from at least 1974 through 1981; that after 1981, the City harassed Yardarm continually; and that Yardarm repeatedly tried to obtain financing for the entire property from 1981 through 1985 but could not do so because of Pompano Beach's earlier activities. Pompano Beach's case centered on evidence that its obstructionism had ended, at the latest, in 1981; that Yardarm's inability to obtain financing was due to a number of causes unrelated to Pompano Beach's earlier actions; and that Yardarm had ultimately lost the property because it had mortgaged the east side property to buy the west side. Pompano Beach also presented evidence concerning the offers to buy both properties for $8,000,000 which Yardarm had rejected in 1983.

In its final order, the court found that Pompano Beach had effected a permanent taking of Yardarm's property on October 30, 1985, based on its history of obstructing the issuance of Yardarm's permit. The final judgment expressed the lower court's reasoning:

As to the taking, Yardarm's cause is pregnant with

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[6]A second count under 42 U.S.C. § 1983 was disposed of before trial based on Yardarm's failure to exhaust its state remedies prior to filing suit. Yardarm's federal takings claim was dismissed for the same reason.

equity. The only embryo the court can countenance (by the City) was the action taken by Walter Williams, the Chief Building Official; however, the City's obstructionist and illegal acts aborted Williams' professed policy toward Yardarm long ago. The course of action chosen by the City initially and throughout the years that the parties have been engaged in litigation, must be described not only as arbitrary but also must be equated with "unfair dealing." Every citizen (which includes Yardarm) has the right to expect that he will be dealt with fairly by his government. Unfair dealing by a municipality carries with it the attendant reponsibility for the adverse effect it knows or should know its deliberate inaction will have upon the parties with whom it is dealing. *See Hollywood Beach Hotel* case.

The first factor to be taken into consideration by the landmark case of *Penn Central Transportation Co.* is the economic impact the governmental action has on the claimant. In this case, Yardarm and its stockholders ultimately filed for bankruptcy primarily because of the City's action. Probably the two most important factors cited in the *Penn Central* case are the "character" of the governmental action and whether the governmental tribunal reasonably concluded that the "health, safety, morals and general welfare" would be promoted prohibited particular uses of land. As to the "character" of the action taken here, it was purely political. The Hillsborough Association, through Fletcher Riley, jumped on the Yardarm issue knowing that the Mayor and the other Commissioners would march to their tune because of the upcoming election. Further, at no time can it be said that the regulatory actions taken by the City promoted safety, morals, health and the general welfare of the City. The only thing promoted by the politicians was the protection of the property owners (Hillsborough Association) from having their view of the ocean and light at the lighthouse obstructed by the construction of the hotel. This distinction is important because City's counsel have relied

on the *First English Evangelical Church* case for the proposition that the landowner must prove that he was denied *all* use of his property. In the Court's view *First English Evangelical Church* is distinguishable because the ordinance in that case prevented the construction of buildings in a flood prone area which certainly promoted the general welfare and safety of the community. In this case, it is undeniable that the only circumstance which necessitated the regulatory action was the adverse political climate which wrought defeat on those commissioners who voted in favor of constructing the hotel.

Similarly, in the *City of Clearwater* case, the court held that the passage of the ordinance for "sanitary," "aesthetic," and "stability" of the neighborhood were not enough for the general welfare of the community. In holding for the property owner, the court went on to state that if the regulatory action had invaded personal or property rights unnecessarily or unreasonably, in violation of the Florida and Federal Constitutions, then it must be equated with arbitrary and capricious action. In our view, the latter principle applies here; therefore, the property owner is not required to prove denial of *all* its property.

To add emphasis to the proposition that it is implicit that the regulatory action be taken for a valid public purpose, just the reverse was true in this case. In fact, two of the City officials, Kleingartner and Riley clearly usurped their authority as they committed illegal acts; the City Manager got involved when it was not his duty to do so; the Mayor was concerned about getting re-elected as were the other commissioners. Finally, under no circumstances can it be said that the public's health, safety and welfare were promoted by protecting the homeowners' view of the ocean and the light from the lighthouse.

While it is not necessary to prove denial of *all* use (for the reasons stated), Yardarm in fact was denied all use of its property. Time and time agaain civil actions had to be

brought; they were always appealed by the City. In the court's estimation these appeals were both dilatory and frivolous. They fostered nothing but to frustrate Yardarm's purpose. Illegal acts of certain City officials caused a lawful permit to be revoked which led to a series of events which ultimately led to the loss of Yardarm's property. In this hostile atmosphere, even if Yardarm had wanted to use the property for another purpose, the City would have not have allowed it.

Counsel for the City have cited the case of *McNulty v. Town of Indiatlantic*, 727 F. Supp. 604, in support of their position that the property owner was not denied all use of his property. As in the *First English* case, a *valid* ordinance was in place for the protection of sand dunes. For this reason, *McNulty* can be distinguished from the facts of this case.

We[7] begin by stating the obvious — that the final judgment of a "permanent taking" based on obstructionist tactics of Pompano Beach is unorthodox for many reasons. First, Yardarm did not own the real property that it claimed the City had "taken;" it had been lost to Yardarm's lender through foreclosure. More important, it involves a claim that Pompano Beach's improper abuse of its permitting power to prevent Yardarm from building an eighteen story hotel was a "taking." Finally, Yardarm's claim depends on the notion that the City did not "take" Yardarm's property until the landowner "gave up" trying to put an eighteen story hotel on it.

The threshold question presented is whether Yardarm's claim can support a judgment for inverse condemnation. We hold that it cannot. Inverse condemnation is a cause of action in favor of a property owner against an agency having the power of

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[7]After an oral argument, the entire Fourth District Court of Appeal rescued itself and a panel of the Fifth District Court of Appeal was assigned by the Chief Justice to sit as the Fourth District Court to decide the case. Because of the lapse of time and the pace of developments in this area of the law, the new panel allowed rebriefing and held a second oral argument.

eminent domain to recover the value of property that has been *de facto* taken, by the agency, even though no formal exercise of the power of eminent domain has been attempted. *City of Jacksonville v. Schumann,* 167 So. 2d 95 (Fla. 1st DCA 1964), *cert. denied,* 172 So. 2d 597 (Fla. 1965). A "taking" in Florida requires the deprivation of substantially all use of the property alleged to have been taken. *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.,* 19 Fla. L. Weekly S169 (Fla. April 7, 1994); *Askew v. Gables-by-the-Sea, Inc.,* 333 So. 2d 56, 61 (Fla. 1st DCA 1976), *cert. denied,* 345 So. 2d 420 (Fla. 1977).

This is not a typical case where a public body's land use regulation has gone "too far,"[8] depriving an owner of substantially all use of his land. The lower court incorrectly ruled that a judgment for inverse condemnation could be had, even in the absence of a deprivation of substantially all use of Yardarm's property, if Pompano Beach's interference with Yardarm's plan for development were an invalid exercise of its police power. This was an understandable error given that "takings" law is one of the most confused areas in America jurisprudence. Confusion on this issue may have arisen, in part, from the notion that a valid exercise of the police power regulating the use of property can give rise to no remedy unless the landowner suffers a deprivation of substantially all use of his land. Somehow, the converse of that proposition found its way into the analysis — if not the holdings — of several appellate decisions. Confusion surely has also resulted from language used loosely in the cases.[9] Recent deci-

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[8]*Pennsylvania Coal v. Mahon,* 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

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[9]*Compare Agins v. City of Tiburon,* 447 U.S. 225, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980), with the case it relies upon, *Nectow v. City of Cambridge,* 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928), which invovled an *injunction* against the improper exercise of the police power. *See also Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 123, 98 S. Ct. 2646, 2658, 57 L. Ed. 631 (1978); *Nollan v. California Coastal Comm'n.,* 483 U.S. 825, 834 n.3, 107 S. Ct. 3141, 3147 n.3, 97 L. Ed. 2d 677 (1987).

sions make clear, however, that the *sine qua non* for inverse condemnation is a "taking" — whether a valid exercise of police power or not, whether temporary or permanent.

In Florida, any uncertainty on this point was dispelled by the Supreme Court in *Tampa-Hillsborough County Expressway Authority,* 19 Fla. L. Weekly at S171. In that case, a land use regulation previously had been struck down by the high court as an invalid exercise of the police power. Here, the lower court determined that the City's actions were "illegal," "arbitrary and capricious," "not taken to promote the public's health, safety or welfare," "frivolous," "dilatory" and a "usurpation of authority." Although speaking in terms of a "taking," the fact findings of the lower court are a classic expression of a denial of due process. *Corn v. City of Lauderdale Lakes,* 997 F. 2d 1369, 1374 (11th Cir. 1993), *cert. denied,* ___ U.S. ___, 114 S. Ct. 1400, 128 L. Ed. 2d 73 (1994). The lower court correctly perceived that the law provides a remedy for such conduct but, unless there is a deprivation of substantially all economic, beneficial or productive use of the property, inverse condemnation is not the remedy. If an *invalid* exercise of police power causes damage not amounting to a "taking," the claim is for a violation of substantive due process and the remedy is monetary damages. *See e.g., Eide v. Sarasota County,* 908 F. 2d 716, 720-722 (11th Cir. 1990), *cert. denied,* 498 U.S. 1120, 111 S. Ct. 1073, 112 L. Ed. 2d 1179 (1991). *See also Tampa-Hillsborough County v. A.G.W.S.,* 608 So. 2d 52, 57 (Fla. 2d DCA 1992) (Altenbernd, J., dissenting).

An example of the correct legal analysis application to this kind of case can be found in *Bello v. Walker,* 840 F. 2d 1124 (3rd Cir.), *cert. denied,* 488 U.S. 868, 109 S. Ct. 176, 102 L. Ed. 2d 145 (1988). The plaintiff was the developer of a multi-phase housing project. It had submitted a site plan for five phases, obtained building permits for phase one and completed construction. When subsequent application was made for phase five of the project, however, the building permit was denied on the ground that the developer had failed to plan the build-out of the

phases in numerical order. Evidence suggested that the town council had made the decision to deny the permit because some of the members wanted to discourage multi-unit housing and because two members of the council had personal animosity toward one of the developer's employees, who was their political rival. Eventually, the developer obtained a court order requiring the issuance of the permit.

The developer also filed suit against the City and the individual council members, asserting deprivation of due process and equal protection, pursuant to 42 U.S.C. § 1983, violation of federal antitrust laws and inverse condemnation. Summary judgment was entered in favor of all defendants on all claims and the developer appealed. The Third Circuit Court of Appeals ruled that the claim for violation of substantive due process, alleging governmental action that was arbitrary, irrational, and tainted by improper motive, including partisan, political or personal reasons unrelated to the merits of the application for the permits, would support a claim under 42 U.S.C. § 1983. *Id.* at 1128-29. *See also Brady v. Town of Colchester,* 863 F. 2d 205, 215-16 (2d Cir. 1988).

In contrast, the Third Circuit upheld the summary judgment in favor of the defendants on the "taking" claim, noting that the plaintiffs could not make out a claim that their property had been "taken" without just compensation because they had merely been denied a particular building permit. Because they retained the right to put their land to multiple alternative uses, the municipality's actions could not have been said to have denied them all use of their property. *Id.* at 1131.

Although the lower court in this case principally ruled that Yardarm need not prove a denial of all use of its land because Pompano Beach's actions were improper, the court also attempted to fit within the "takings" cases by finding that "[i]n this hostile atmosphere, even if Yardarm had wanted to use the property for another purpose, Pompano Beach would not have allowed it." This finding is simply not supported by any evidence in the record. While Yardarm's evidence may have demon-

strated Pompano Beach's determined opposition to Yardarm's construction of an eighteen story hotel, there is no evidence of obstruction of any other use. Yardarm was in fact using the property for an alternative use — the restaurant — through April of 1977. There was always the ability to build a ten story building. In addition, Yardarm was in possession of a valid permit to build an eighteen story hotel on the east side from July 1981 until March 1985. No permit for the west side was ever applied for.

As alluded to in *Bello, supra.* in cases involving permit denials, it is usually difficult for a claimant to establish a "taking." A sister court in Oregon recently explained:

> [W]ith rare exceptions, no particular denial of an application for a use can demonstrate the loss of all economic use. That is so for two reasons. First, the fact that one use is impermissible under the regulations does not necessarily mean that other economically productive uses are also precluded; and second, until alternative uses are applied for or alternative means of obtaining permission for the first use are attempted, there can be no conclusive authoritative determination of what is legally permissible by the regulations.

Nelson v. City of Lake Oswego, 869 P.2d 350 (Or. App. 1994). *See also Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 136-137, 98 S. Ct. 2646, 2665-2666, 57 L. Ed. 2d 631 (1978).

Total takings based on the denial of a permit are appropriate where the evidence shows that a city intends to deny *all* permits for development as an indirect method of dedicating property to a public purpose. *See, e.g., Vatalaro v. Department of Envtl. Regulation,* 601 So. 2d 1223 (Fla. 5th DCA) (holding permit denial was taking requiring compensation where language used in denying permit made it clear that only use for ecologically sensitive land was to look at it), *review denied,* 613 So. 2d 3 (Fla.

1992).[10] A "taking" may also be found where a landowner is denied a permit for the only feasible use of the land, thereby effectively denying him or her the "economically viable" use of the land. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985) (recognizing principle); *Resolution Trust Corp. v. Town of Highland Beach*, 18 F. 3d 1536, 1549 (11th Cir. 1994) (property was "completely unusable" after lapse of PUD zoning). *See also Alexander v. Town of Jupiter*, 19 Fla. L. Weekly D1049 (Fla. 4th DCA May 11, 1994) (landowner denied permit to clear land to remove trees that would permit survey.)

Even if the earlier denials of building of dock permits by Pompano Beach could have constituted a "taking" of Yardarm's property, all requested permits had been issued by 1981. The trial court made no findings concerning any further obstruction by the City. Rather, the court focused on Yardarm's inability to obtain financing after 1981 due to the City's "hostility" to the project. The inability to obtain financing may be caused by a "taking" or may be some evidence of a "taking," but it is not a taking. *See Southpark Square, Ltd. v. City of Jackson*, 565 F. 2d 338, 343 (5th Cir. 1977), *cert. denied*, 436 U.S. 946, 98 S. Ct. 2849, 56 L. Ed. 2d 787 (1978). In *Southpark*, the court considered the "novel" question of "whether a city's denial of a building permit, ultimately resulting in the owner's loss of his property for inability to obtain financing, is compensable taking." *Id.* at 342. The court rejected the claim, reasoning:

> A city could be unduly hamstrung if its permit decision subjected it to potential liability on the basis of finan-

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[10] *Accord Kraft v. Malone*, 313 N.W.2d 758 (N.D. 1981) (by denying building permit in city, city had effectively taken property for public park and drainage ditch); *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978) (finding taking where city denied permit specifically to preserve area as scenic easement for benefit of public and to prevent development of any kind). *See also Karatinos v. Town of Juno Beach*, 621 So. 2d 469 (Fla. 4th DCA 1993) (finding that city was not cause of taking where city engineer testified that state would never have permitted construction of any building on property), *review denied*, 634 So. 2d 625 (Fla.), and *cert. denied*, ___ U.S. ___, 114 S. Ct. 2133, 128 L. Ed. 2d 864 (1994).

cial rrangements independently made by property owners affected by those decisions.

Id. at 343. As explained above, if Yardarm was placed in financial difficulty as a result of the City's prior unlawful acts, it had to pursue a damage remedy; its land had not, however, been taken by Pompano Beach.

Finally, Yardarm's alleged inability to obtain financing is not the type of negative economic impact compensable as a taking. *See Highland Beach,* 18 F. 3d at 1536. For the period after 1981, Yardarm is not only unable to show that it was denied any particular use of its property, but it is unable to establish a negative economic impact on land value resulting from Pompano Beach's actions. The Federal Circuit Court of Appeals has recently held that the issue of negative economic impact requires consideration of the relationship of the owner's basis or investment and is measured by the change, if any, in the fair market value before and after the "taking." *See Florida Rock Indus., Inc. v. United States,* 18 F. 3d 1560 (Fed. Cir. 1994). Yardarm itself estimated that the value of its property rose from $5 million in 1981 to $6.2 million in 1985, and it rejected an offer for the property of $8 million in 1983 because it thought it was too low.

Also relevant to our conclusion that there was no "taking" in this case, as a matter of law, is the date this "taking" was found by the lower court to occur: the date of expiration of the City's 180 day deadline within which to reapply for a permit after the east parcel permit had lapsed for lack of work. This date is not tied to any particular act on the part of Pompano Beach; rather, it appears to represent the date Yardarm decided to (or had to) "give up." Yardarm contends that, under Florida law, the date of a "taking" is the date a landowner quits struggling against the condemning authority's confiscatory regulation. This argument, however, is merely a misapplication of the ripeness doctrine. Ripeness and persistence are not the same thing. Ripeness is required in regulatory taking cases because a court is unable to determine whether a regulation "goes too far" for purposes of a regulatory "taking" analysis until it has been determined exactly

how far the regulation has gone. Ripeness does not require Yardarm to engage in years of litigation with the City. Once Yardarm had made a definite and meaningful effort to obtain City approval for its eighteen story hotel and Pompano Beach had evinced an intention not to give it, Yardarm's claim was ripe.[11] If its property were effectively "taken," Yardarm was not obliged to keep suing to invalidate the City's decision, although it was privileged to do so. If, while in force, the City's invalid actions caused a "taking," damages were available for the "temporary taking." *Lucas*. Here, by 1981, the permit refusal had ended and the permit was in hand.

The probable reason for the court's selection of the date of "taking" was Pompano Beach's statute of limitations defense. In rejecting this defense, the lower court relied on *Askew*.[12] On appeal, Pompano Beach again contends that, even if there were a permanent total "taking" in this case, this action is barred by the statute of limitations. In making this argument, Pompano Beach asserts that the applicable statute of limitations is the four year statute pertaining to either "[a]n action founded on a statutory liability," 95.11(3)(f), Fla. Stat. (1985), or the four year statute applicable to "[a]ny action not specifically provided for in these statutes." § 95.11(3)(p), Fla. Stat. (1985). Pointing out that Yardarm's permit for the east side was reinstated on July 16, 1981, and that the permit remained in effect until May 1, 1985, when it was revoked by operation of law, Pompano Beach maintains that there clearly was no "taking" in the four year

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[11] *See generally* Note, *Finality Ripeness in Federal Land Use Cases from Hamilton Bank to Lucas*, 9 J. of Land Use & Environmental Law 101, 115-27 (Fall 1993). Yardarm itself has argued that by June 1974 it had become "obvious" that Pompano Beach had "no intention to reissue the permit to build the hotel . . ."

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[12] *Askew* is inappropriate to the facts of this case, however. Although the pattern of conduct may have been similarly lengthy on the part of the state, the triggering event, which was opposition to the Corps of Engineers' extension of the landowner's dredge permit, occurred within the statute of limitations. The statute of limitations was no an issue in that case.

period preceding Yardarm's commencement of the action and that, consequently, the action is barred.

Yardarm agrees that the appropriate statute of limitations, if any,[13] is four years, but it contends that Pompano Beach's limitations defense is "nonsensical" in that "Yardarm could not bring a taking case against Pompano Beach because it kept winning." Relying on *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982) and *Albrecht v. State*, 444 So. 2d 8 (Fla. 1984), Yardarm contends that a cause of action for inverse condemnation does not accrue until a property owner stops challenging the action taken by the government in opposition to development. *Albrecht* and *Key Haven*, however, really have no application to this issue and do not support Yardarm's theory. *Albrecht* simply stands for the proposition that, assuming a deprivation of all use of the land has already taken place, the landowner has two choices: to try to undo the taking or to seek compensation. This remains true, if incomplete, in light of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987). Now it is clear that the landowner may seek compensation for the period while there was a deprivation of use before the taking was undone. It does not mean, however, that the statute of limitations for a "taking" does not begin to run so long as the landowner opposes the agency action that has worked a "taking."

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[13] *See generally* Charles C. Marvel, *State Statute of Limitations Applicable to Inverse Condemnation or Similar Proceedings by Landowner to Obtain Compensation for Direct Appropriate of Land Without the Institution or Conclusion of Formal Proceedings Against Specific Owner*, 26 A.L.R. 4th 68 § 2 (1983). The argument for the statute of limitations is inapplicable to actions for inverse condemnation has previously been rejected by the Florida Supreme Court. *See, e.g., Hillsborough County v. Kensett*, 107 Fla. 237, 144 So. 393 (Fla. 1932) (actions for inverse condemnation are subject to both the statute of limitations and the doctrine of laches). This case is a good illustration of why a statute of limitations is appropriate in these types of cases; here, several of the key witnesses had died or become unavailable years before this action was brought.

The statute of limitations issue in this case first requires consideration of when the City took any action that deprived Yardarm of substantially all use of its land. Assuming arguendo that the answer is something other than "never," it is at least clear that, on the date suit was filed, September 15, 1987, the statute of limitations had run as to any "taking" that occurred earlier than September 15, 1983. Any "taking" occurred when the permit was denied and Yardarm lost its right to develop, *Vatalaro,* 601 So. 2d at 1229, and ended in 1981 when the permit was reissued.

The final question is whether the City took any separate action that rose to the level of a "taking" after September 15, 1983. We can find nothing in the record that would support a finding that there was a "taking" by the City after that date. Contrary to the view taken by the lower court, in this type of case, there can be no "domino effect" or "piggybacking" of all the offenses of prior years so that previous, time-barred "temporary takings" turn into a permanent taking whenever the regulatory authority takes any new action adverse to the developer and the developer decides he has had enough. If Yardarm had a "taking" claim for what happened up to July 16, 1981, it had until July 16, 1985 to bring it.

Because this case is before us on appeal from a non-final order and because we reverse that order, the case is remanded to the lower court for further proceedings. We note that the lower court previously had entered an order granting partial summary judgment on Yardarm's due process claim brought under 42 U.S.C. § 1983 based on the City's contention that such a claim would be "premature" until the "taking" claim was disposed of. Although we express no opinion about the merits of a due process claim on this factual record, in light of our opinion, Yardarm is entitled to reconsideration of the summary disposition of this cause of action.[14]

REVERSED and REMANDED.

COBB, W., and PETERSON, E., Associate Judges, concur.

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[14]We find no merit in the issue on appeal pertaining to the improper use of deposition testimony. We do not reach the *res judicata*/collateral estoppel/law of the case issue because our decision makes it unnecessary.

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL COURT IN AND FOR BROWARD COUNTY, FLORIDA

YARDARM RESTAURANT, INC.,
Plaintiff,

v.

CITY OF POMPANO BEACH,
Defendant

Case No. 87-19652 (23)

FINAL JUDGMENT

This is one of a succession of cases the parties to this action have litigated since 1973. See Chronology, Appendix "A."

This particular case was commenced by the plaintiff, Yardarm Restaurant, Inc., a Florida Corporation (hereinafter referred to as "Yardarm") against the City of Pompano Beach (hereinafter referred to as "City") for inverse condemnation, an equitable action. The City has denied that there was a "taking" of Yardarm's property and has asserted affirmative defenses of *res judicata* and/or collateral estoppel; also, that the claim is time-barred because the statute of limitations has run.

Factual Background: The property on the east side of A1A, which lies directly next to the Hillsboro Inlet, was purchased in 1959 by the plaintiff corporation. There Yardarm built and ran a very successful restaurant for a number of years. In 1972, Yardarm decided to build an 18 story hotel on this property. In furtherance of this decision, the City's zoning laws, restrictions and regulations were checked and it was determined that no height nor density requirements stood in the way of building an 18 story hotel. Yardarm's plans became well known at City Hall

and were highly publicized in the news media. Almost immediately, opposition to the hotel began to mount.

At this point, it is important to identify the players and their testimony together with other events of 1972, 1973 and 1974.

1. *Jim Stephanis and Tom Stephanis* — Brothers who owned, 50% each, the Yardarm stock and ran the Yardarm Restaurant. They also owned the Wharf Restaurant in Lauderdale-By-The-Sea. Jim was active in the Democratic party and at one time ran for U.S. Congress. He later ran for the Chairmanship of the Broward County Democratic Party;

2. *Walter C. Williams* — Williams was the Chief Building Official of the City of Pompano Beach having held that position since 1969. His duties included supervision of field investigators and issuance of building permits upon building code compliance. He was in charge of the building department and reviewed plans to make sure they complied with the South Florida Building Code.

Williams' first contact with the Yardarm project was in December of 1972 when an associate of the architect assigned to build the hotel called him. Williams made preliminary inquiries concerning the project and determined that the Yardarm application for an 18 story hotel was proper. He issued the permit on February 14, 1974.

In the early morning of the 14th, a meeting was held between certain city officials and the Yardarm people. At this meeting, one participant, Fred Kleingartner, voiced certain objections to the entire Yardaram plan. He held the unofficial title of "Planning Director." These objections were made by Kleingartner but they were at the instance of the Mayor and the City Manager. Despite these objections, Williams approved the permit later that day. At that time, there was neither a height limitation nor a density restriction for the construction of a hotel.

Four days later, February 18, 1974, Williams revoked the permit upon orders given to him by the City Manager. The revocation of the permit was done over Williams' objections and even though the plans had already received approval. When a

second "review" of the plans was made, Williams, again, advised the City Manager and Kleingartner that the Yardarm project was in compliance. However, both men turned deaf ears on Williams' advice. When yet a third "review" was completed, it was again determined that the Yardarm project was in compliance, no permit was issued.

In early May of 1974, the City Manager forced Williams to sign a letter addressed to Yardarm's lawyer in which Williams stated that there were objections to the application. This letter was completely orchestrated by the City Manager and was not agreed to by Williams. Williams was forced to write a second letter which stated that the zoning for the Yardarm property would be changed. After receiving a reply from Yardarm, Williams was again forced to respond and state facts that he did not agree to.

3. *William J. Alsdorf* — Commissioner and Mayor of Pompano Beach. According to the Mayor, the Yardarm permit was granted on February 14, 1974 and revoked 4 days later. This revocation came as the result of the meeting between the City Manager, Fletcher Riley, Fred Kleingartner and the Mayor. The Mayor stated that "Fletcher Riley had no business even attending the meeting because he was only a member of an advisory board." Riley was also a powerful member of the Hillsboro Shores Improvement Association, Inc., which had objected to the Yardarm project because the Association said the hotel would block the homeowners' view of the ocean. The Mayor pointed out that Riley was adamantly opposed to the project and the issuance of the permit. According to the Mayor's testimony, Kleingartner also asserted his negative views of the Yardarm. Mayor Alsdorf was quick to point out that as head of the Community Development Department, Kleingartner had no authority to participate in the decision-making process. In other words, Kleingartner was acting illegally at the City Manager's behest.

The Mayor also stated that the administration, meaning the City Manager and Kleingartner, had not acted wisely nor had

they played by the rules. However, with the upcoming election around the corner, the Mayor was also cognizant that a wrong decision could easily cost him the election. He specifically addressed his statements to a fellow commissioner, Max Ryder, and told him that he needed a good political lesson regarding his vote on the Yardarm. The Mayor was also concerned about the fact that the Republican Club was going to censor two commissioners for their vote in favor of the Yardarm. Incidentally, these two commissioners were defeated in the February 19, 1973 election. The Major also mentioned that certain Republican officials tried to intimidate the only black commissioner regarding this project.

4. *John G. Cartwright* — The testimony of Cartwright, the City Manager, established that he really had nothing to do with the issuance of building permits in his capacity as City Manager but that he made a special exception for the Yardarm project. He stated that he instructed Walter Williams to revoke the building permit after he read "a big article in the paper" and conferred with Fred Kleingartner. Cartwright said that Williams was in disagreement with this position. Cartwright further testified that Kleingartner was serving illegally during this period of time.

He stated that Fletcher Riley had put pressure on him regarding the permit and asked him why it had ever been issued at all. Cartwright said that he had discussed the Yardarm with every commissioner during the election and that the Yardarm had become the major political issue. Not coincidentally, Commissioner Williams defeated Commissioner Ryder because of Ryder's position in favor of the Yardarm. He stated that the objections to the three subsequent "reviews" came from himself and the politicians and not from Williams.

5. *C. H. Fletcher Riley* — Riley held the title of Chairman of the Planning Board, with no "official" status. His Board had nothing to do with Yardarm's application. The Board's only official connection with the Yardarm project was to advise the Commission concerning the special exception use. In this capacity, the Board made a recommendation against the exception for

the 18-story hotel.

Despite his lack of "official" status, Riley was very vocal about the permit revocation. According to his testimony, he arrived at City Hall at 8:00 a.m. on February 18, 1974, to confront the City Manager as to how the Yardarm permit could have ever been granted in the first place. He said that he conferred with Kleingartner between the time the permit was issued on the 14th and when it was revoked four days later on the 18th. Riley had a very close relationship with Kleingartner and admitted that Kleingartner was working for the City in an illegal capacity.

Riley also stated that he offered advice which he knew was not his function. He stated that he contributed money to candidates who said they would keep the Yardarm hotel from being built. Those candidates were Ken Williams, William Alsdorf and Herbert Bard. When asked whether he was familiar with an attempt by the Republicans to censor two commissioners and intimidate a black commissioner for their support of the Yardarm, he was instructed by his lawyer, Russell Clark, not to answer the question.

6. *The Hillsboro Shores Improvement Association, Inc.* — A homeowners' group located on the south side of Hillsboro Inlet. They were led by Fletcher Riley, while wearing his "other hat." Riley was the prime mover behind the Association's decision to sue the City. The Association's main objections to the construction of the hotel were that it would block the view of the ocean and also block the light coming from the lighthouse at night.

7. *The Republican Club* — This organization threatened censorship of the commissioners who supported the Yardarm. It also tried to intimidate the lone black commissioner for his support of the Yardarm project.

With regard to the chronology of events that followed, while Yardarm was preparing to make re-application for the building permit, the City reduced the height limitation from 18 to 10 stories. Thereafter, Yardarm applied for and finally received the special exception use to construct an 18 story hotel in

October of 1973. As previously mentioned, this special exception use was vigorously opposed by Riley and the other members of the Hillsboro Association. After a 3-2 vote in favor of Yardarm, the Association filed suit to contest the City's action. Yardarm intervened in this lawsuit which resulted in a decision in favor of the City and Yardarm in sustaining the ordinance which created the special exception use. In early 1974, Yardarm reapplied for another permit. It was during this time that the City Manager, Cartwright, Kleingartner and Riley found technical flaws with the plans. While Williams was the only individual with authority to approve building permits, he was instructed not to approve the permit by the City Manager. This was done by sending a letter to Yardarm which he did not compose but was required to sign. After three such "reviews", Yardarm again resorted to court action and in 1977 the permit was issued after $2^1/_2$ years of litigation in the circuit and Appellate Courts.

At this point, the City commenced to harass the Yardarm people regarding the work in progress, disputes over dock permits and other matters. Yardarm was forced to go back to court to get dock permits. This was in late 1978.

In 1979, the permit was again revoked and Yardarm did not receive it back until July of 1981 after another two years of litigation. Thus, for the first eight years after the permit was originally issued, Yardarm was forced to defend the granting of the permit and special exception use 8 different times either in the lower court of in the Apellate Court. All of these decisions resulted in wins for Yardarm. By this time, it is quite obvious that the City and its officials had become very litigious and hostile toward the Yardarm.

While all of the before-mentioned litigation was pending, Yardarm tried to obtain financing for the construction of the buildings, first on the east side of A1A and then on the west side for the property it had purchased there in 1981. No less than 48 attempts were made at obtaining financing. All attempts for permanent financing failed, although certain other smaller loans were obtained. Several reasons for Yardarm's failure to obtain

permanent financing: 1. The lenders were looking for a bigger project; 2. The cost per room was prohibitive; 3. The configuration of the properties wasn't right, etc. However, by far the biggest and overriding reason given was the City's hostility toward the project. No lending institution wanted to get involved in a community where there had been so much wranging and bitter opposition to the project. Because of this acrimonious atmosphere and the adverse publicity, Yardarm's credibility in the financial community was nil.

In May of 1985, the City advised Yardarm that its permit had lapsed because as the City phrased it, "Yardarm had done minimal work to keep the permit alive." In October of 1985, Yardarm applied for another permit for the construction of the buildings on both sides of A1A. At this time, the City had pending a proposed ordinance to revoke the special use exception which had been granted to Yardarm 12 years earlier. Once again, Yardarm went to court and obtained an injunction against the City preventing it from repealing the special use exception. This decision was appealed by the City and in July of 1987, the Appeals Court reversed the lower court and ruled that the principles of equitable estoppel did not apply and that the City was within its rights to pass the ordinance in question as it was an administrative function of the City.

It should be noted that in May of 1985, Sunrise Savings and Loan Association sued the Yardarm to foreclose the mortgage. On February 20, 1986 Sunrise obtained a judgment of foreclosure with a sale date of March 21, 1986. On the eve of the foreclosure sale, Yardarm filed for protection under chapter 11 in the Bankruptcy court and obtained a stay of the foreclosure proceedings. Thereafter, the stay was lifted and the Federal Savings and Loan Insurance Corporation (FSLIC), as receiver for Sunrise, purchased the property and then sold it to the City (irony of all ironies). This suit followed in 1987.

ISSUES:

1. Whether there was a taking of the property in question;

2. Whether the doctrines of *res judicata* and/or collateral estoppel are available as defenses;

3. Whether the statute of limitations has run on the plaintiff's claim.

THE CASE LAW:

1. *Penn Central Transportation Co. v. City of New York,* 98 Sup. Ct. 2646

As pointed out in this case at page 2659, the question of "what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. Quite simply, the trial court has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government. Each case rises or falls largely "upon the particular circumstances in that case." As identified in the cases, several factors have been taken into consideration:

a. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations;

b. The "character" of the governmental action;

c. Where the governmental tribunal reasonably concluded that the "health, safety, morals or general welfare" would be promoted by prohibiting particular contemplated uses of land. See numerous cited cases.

Further, this case cites the case of *Goldblatt v. Hempstead,* 82 S. Ct. at page 990 for the proposition that it is implicit that a use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose.

Finally, the case quotes Mr. Justice Holmes, who, speaking for the court, warned that the courts were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the

constitutional way of paying for the change." Citing *Pennsylvania Coal Co. v. Mahon,* 43 Sup. Ct. @ 160.

2. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 107 S. Ct. 2378 (1987), in which the City has heavily relied upon, the Supreme Court came to grips with the problem of remedies for a regulatory taking. The California Court of Appeals had rejected a landowner's claim for damages due to a land use regulation prohibiting any building in a flood prone area. The Court of Appeal's reasoning was based on the California Supreme Court's holding that inverse condemnation is not available to an owner suffering loss because of a zoning regulation. The only available remedies for affected Californians were mandamus or declaratory relief. If a zoning regulation is declared invalid, said the California courts, then, if the government persisted in applying the voided regulation, damages might be recoverable.

The *First English Evangelical* decision expressly examined the question of whether a state may constitutionally limit the remedy for a taking to non-monetary relief. After a detailed discussion of the theory and precedent the Supreme Court held that:

"... where the government's activities have already worked a taking of *all* use of property, no subsequent action by the government (i.e., amendment or elimination of the ordinance) can relieve it of the duty to provide compensation for the period during which the taking was effective . . . Invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy . . ."

3. *City of Clearwater v. College Properties, Inc.,* 239 So2 515

In this case, the City of Clearwater had denied applicant's request for change of zoning. The circuit court quashed the action taken by the City and enjoined it from enforcing its zoning regulations as applied to the applicant's property and ordered the City to change the zoning of applicant's property to a less

restrictive classification. The City appealed.

In this case, the City Planner stated that the zoning in place was better for "sanitary" and "aesthetic" reasons and that it would give "stability" to the neighborhood; also, that it would prevent an increase flow of traffic in the neighborhood.

The trial court found that the evidence clearly established that the zoning regulation in question as applied to applicant's property was unlawful, unreasonable and capricious; that the restrictions imposed on the property bore no relationship to the public health, safety, morals or welfare of the citizens and that the action of the City was contrary to law and amounted to confiscation of applicant's property.

In affirming the trial court, the appeals court stated that a reduction in the value of the property caused by the zoning ordinance is not, of itself, enough to render the ordinance confiscatory. The property owners must show that the application of the zoning ordinance has the effect of completely depriving them of the beneficial use of their property by precluding all uses *or the only use to which it is reasonably adopted, or that the ordinance has invaded their personal property right unnecessarily or unreasonably in violation of the Federal or Florida Constitution.* (Court's Emphasis)

4. *Askew v. Gables-By-The-Sea, Inc.* 333 So2 56

In January of 1936, plaintiff acquired by purchase, from the Trustees of the Internal Improvement Fund, a substantial tract of bay bottoms in Biscayne Bay and the City of Coral Gables. The bulkhead line had extended seaward and was reestablished some distance seaward from its previous location. In 1956, the plaintiff began to seek the necessary permits to dredge from the adjacent public bottoms and fill its land. The Trustees agreed to issue the permit in May of 1956. In 1967, plaintiff purchased and paid for the second parcel of bottoms — that lying between the old and new bulkhead lines. Prior to October, 1965, the City of Coral Gables approved a fill permit which was extended to 1968. The Trustees also approved it. In May of 1968 the Trustees, by resolution, prohibited any person from dredging unless said

operations had already commenced. When this permit denial was lifted, the U.S. Corps of Engineers, which previously had permitted the project, ruled that the permit had expired and would not be revived or extended. The court ruled that these actions were without lawful authority and void and that plaintiff had the lawful right to dredge material from the areas on the permit. The case was appealed. The Appeals Court in affirming the inverse condemnation judgment held:

"It is the conclusion of this court that the appeal herein is dilatory in nature, is sought by appellants for the sole purpose of further frustrating and delaying compliance with the mandate of this court and the final judgment of the trial court, is frivolous, and not taken in good faith."

In this case, it took the landowner 13 years of bureaucratic delays and protracted litigation to get its permit.

In finding for the owner, the court concluded that not only had the owner's permit been unlawfully revoked but that the revocation ultimately resulted in the denial to the plaintiff the use of his land for private purposes (after 13 years of litigation). Further, the court concluded that the unlawful action of the Defendants caused the valid permit to expire; that the Defendants had used every court process to delay the granting of the permit which ultimately caused the Plaintiff to be denied the use of his property. The Defendants were enjoined and the plaintiff was found to be entitled to a judgment requiring the Defendants to institute condemnation proceedings.

5. *The Hollywood Beach Hotel Co. v. The City of Hollywood,* 329 So2 10

The plaintiffs owned 105 acres in the City of Hollywood which were zoned for a golf course. In 1968 the owners decided to develop the property into a 6000 unit complete community and petitioned the City for a change of zoning. This change was adopted by the City upon passage of an ordinance to that effect. In early December of 1969, two commissioners who voted for the ordinance were defeated for re-election. On December 17, 1969, the two new commissioners joined with the commissioner

who had originally opposed the ordinance to petition the planning and zoning for a reevaluation of the project. On December 30, 1969, the owners obtained a building permit from the State for the construction of the first five million dollar building. On January 12, 1970, the Planning and Zoning Board tabled the City's motion for reevaluation. Also, on January 12, 1970, the building permit for the project was issued by the City. On February 19, 1970, the City brought a petition to rezone the property before the Planning and Zoning Board. On February 21, after nine or ten months of preparation and an expenditure of $191,000, the owners sued the City for injunctive relief. The court denied the temporary relief and denied the City's motion to dismiss. The City filed an interlocutory appeal on March 19th. In the meantime the Planning and Zoning Board denied the City's petition to rezone. The City appealed the Planning and Zoning Board's decision which was tabled for 60 days on July 15th and the City extended the building permit. On August 21, the Court of Appeals affirmed the trial Court's denial of the motion to dismiss. The City then voted to petition for rehearing and, if denied, to appeal to the Supreme Court. After rehearings and petition for certiorari were denied in January, 1971, the City filed its answer on February 1971. The City then rescinded the extension of the permit and demanded that the owners exercise their rights under the permit within 90 days. On March 17, the petitioners requested the return of their permit fee until building conditions improved. This request was denied. In the meantime, the suit for injunctive relief was actively prosecuted. In December 1971, the remaining two commissioners who had voted for the change of the ordinance were defeated. In January 1972, the Commission asked the Planning and Zoning Board to, again, reevaluate the project. Also, the Commission took the first action to lower the density on the property. This requirement had the effect of rendering the property site plan useless. Owners then sought another temporary injunction. On February 14, the Planning and Zoning Board approved a rezoning plan. At the hearing for injunctive relief, the petitioner pointed out that the delays

together with the newspaper coverage had prevented them from getting financing and that the project had been kept in limbo because of the City's actions: that the site plan had been rendered useless as was the building permit.

On March 1, 1972 the density ordinance passed and on April 17, the Planning and Zoning Board recommended that the property be rezoned. On June 28, the commission rezoned the property. On July 19, the trial court entered a permanent injunction against the City enjoining the passage of the ordinance. The District Court reversed and the Florida Supreme Court granted certiorari. The Supreme Court found that the Appeals Court had substituted its' judgment for that of the trial court and had reevaluated the evidence. It also found that the owners had taken steps which equitably estopped the City and that the owners' building permit was not forfeited. The Court noted that, *"it is undeniable that the only circumstance which necessitated the ultimate rezoning was the adverse political climate which wrought defeat of every commissioner who had voted for the rezoning; also, that the City sought to accomplish by delay that which it could not accomplish by immediate rezoning.* (Court's emphasis)

Other cases have been cited by respective counsel and will be referred to in the holding of this case.

Findings:

The court finds that there was a "taking" by inverse condemnation of plaintiff's property by the defedant City; that the doctrines of *res judicata* and/or collateral estoppel are not available as defenses by the City; that the statute of limitations did not run as the City claims.

As to the taking, Yardardm's cause is pregnant with equity. The only embryo the court can countenance (by the City) was the action taken by Walter Williams, the Chief Building official; however, the City's obstructionist and illegal acts aborted Williams' professed policy toward Yardarm long ago. The course of action chosen by the City initially and throughout the years that the parties have been engaged in litigation, must be described not

only as arbitrary but also must be equated with "unfair dealing." Every citizen (which includes Yardarm) has the right to expect that he will be dealt with fairly by his government. Unfair dealing by a municipality carries with it the attendant responsiblity for the adverse effect it knows or should know its deliberate inaction will have upon the parties with whom it is dealing. See *Hollywood Beach Hotel case*.

The first factor taken into consideration by the landmark case of *Penn Central Transportation Co.* is the economic impact the governmental action has upon the claimant. In this case, Yardarm and its stock holders ultimately filed for bankruptcy primarily because of the City's action. Probably the two most important factors cited in the *Penn Central* case are the "character" of the governmental action and whether the governmental tribunal reasonably concluded that the "health, safety, morals and general welfare" would be promoted prohibited particular uses of land. As to the "character" of the action taken here, simply stated, it was purely political. The Hillsboro Association, through Fletcher Riley, jumped on the Yardarm issue knowing that the Mayor and the other Commissioners would march to their tune because of the upcoming election. Further, at no time can it be said that the regulatory actions taken by the City promoted safety, morals, health and the general welfare of the City. The only thing promoted by the politicians was the protection of the property owners (Hillsboro Association) from having their view of the ocean and light at the lighthouse obstructed by the construction of the hotel. This distinction is important because City's counsel have relied on the *First English Evangelical Church* case for the proposition that the landowner must prove that he was denied *all* use of his property. In the Court's view *First English Evangelical Church* is distinguishable because the ordinance in that case prevented the construction of buildings in a flood prone area which certainly promoted the general welfare and safety of the community. In this case, it is undeniable that the only circumstance which necessitated the regulatory action was the adverse political climate which wrought

defeat on those commissioners who voted in favor of constructing the hotel.

Similiarly, in the *City of Clearwater* case, the court held that the passage of the ordinance for "sanitary," "aesthetic," and "stability" of the neighborhood were not enough for the general welfare of the community. In holding for the property owner, the Court went on to state that if the regulatory action has invaded personal or property rights unnecessarily or unreasonably, in violation of the Florida and Federal Constitutions, then it must be equated with arbitrary and capricious action. In our view, the latter principle applies here; therefore, the property owner is not required to prove denial of *all* use of its property. To add emphasis to the proposition that it is implicit that the regulatory action be taken for a valid public purpose, just the reverse was true in this case. In fact, two of the City officials, Kleingartner and Riley clearly usurped their authority as they committed illegal acts; the City Manager got involved when it was not his duty to do so; the Mayor was concerned about getting re-elected as were the other commissioners. Finally, under no circumstances can it be said that the public's health, safety and welfare were promoted by protecting the homeowners' view of the ocean and the light from the lighthouse.

While it is not necessary to prove denial of *all* use (for the reasons stated), Yardarm, in fact, was denied all use of its property. Time and time again civil actions had to be brought; they were always appealed by the City. In the court's estimation these appeals were both dilatory and frivolous. They fostered nothing but to frustrate Yardarm's purpose. Illegal acts of certain City officials caused a lawful permit to be revoked which led to a series of events which ultimately led to the loss of Yardarm's property. In this hostile atmosphere, even if Yardarm had wanted to use the property for another purpose, the City would not have allowed it.

Counsel for the City have cited the case of *McNulty v. Town of Indiatlantic*, 727 F. Supp. 604, in support of their position that the property owner was not denied *all* use of his property. As in

the *First English* case, a *valid* ordinance was in place for the protection of sand dunes. For this reason, *McNulty* can be distinguished from the facts of this case.

City's counsel claim that Yardarm's case is time-barred. This case is not unlike *Askew vs. Gables-By-The-Sea, Inc.* In that case, it took the landowner 13 frustrating years to finally obtain its permit. There, the illegal revocation of the permit finally caused the loss of the property. If the statute of limitations is applicable in this case (and the court isn't sure that it is) then it was tolled for the same reasons that it was tolled in *Askew*. The dilatory and bad faith actions of the City were continuous in nature and, indeed, had a domino effect which ultimately caused the loss of the property.

The City has also raised the defenses of *res judicata* and/or collateral estoppel. It cites *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 509 So2 1295 as its authority. In that case certain statements were made by the court to the effect that the City's "obstructionist tactics" had ended in 1979. In that case, the court did not have a complete and up-to-date record. Further, the statement was *dicta* and did not pertain to the holding of the case. The court noted that the City had never been given an opportunity to determine whether the ordinance in question served the public's interest and for that reason should not be enjoined; that, also, Yardarm had not shown sufficient basis for "irreparable injury" grounded in principles of estoppel and equitable estoppel to sustain a request for permanent injunction. Since the causes of action and issues of that case are entirely different from the cause of action for inverse condemnation in this case, the principles of *res judicata* and/or equitable estoppel do not apply.

For the reasons stated, the Court finds that there was a taking of plaintiff's property (the fee) as described in the attached Appendix "B"; that the effective date of the taking was October 30, 1985; that the City of Pompano Beach is responsible for the taking and is liable for payment of full compensation under the constitutions of the United States of Florida and Florida's eminent domain law, F. S. 73 and 74; that a jury shall

be impanelled to make its findings relative to the issue of valuation; that the City of Pompano Beach shall be responsible for payment of reasonable costs and attorney's fees for the entire proceeding; that the hearing regarding reasonable attorney's fees and costs shall be heard after the conclusion of the valuation trial.

DONE AND ORDERED this 5th day of June, 1991
C. LAVON WARD, Circuit Judge

Copies furnished:
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